Sunrise Green Sdn Bhd v Pentadbir Tanah dan Galian Wilayah Persekutuan Kuala Lumpur

HIGH COURT (KUALA LUMPUR) — LAND REFERENCE NO WA-15–4–07 OF 2020
QUAY CHEW SOON JC
14 OCTOBER 2021

Land Law — Acquisition of land — Compensation — Land reference — Applicant's land compulsorily acquired by Federal Government — Land administrator awarded compensation in respect of market value of land and injurious affection — Applicant objected to award given by land administrator and applied for the objection to be referred to High Court — Whether award manifestly low — Whether Evidence Act 1950 applicable in land reference matter — Evidence Act 1950 s 28 — Land Acquisition Act 1960 s 8

The applicant was the owner of 466 square metres of land located in Kuala Lumpur ('the subject land'). A portion of the subject land was compulsorily acquired by the Federal Government to build a highway. The land administrator ('the respondent') had awarded the following: (a) compensation of RM536,355 in respect of the market value of the acquired land of 59.595 square metres based on a value of RM9,000 per square metre; (b) injurious affection of RM548,647 on the balance of the unacquired portion of 406.405 square metres ('the remainder land') at 15% on a value of RM9,000 per sqmt; and (c) other miscellaneous costs such as the valuers costs and relocation costs for the tenant. It ought to be noted that the applicable valuation date in the present case was 4 February 2019 ie the date of publication in the Federal Government *Gazette* Notification of the declaration made under s 8 of the Land Acquisition Act 1960 ('the Act'). The applicant objected to the award and applied for the objection to be referred to the High Court. The applicant argued that the award was manifestly low in respect of: (i) the market value for the land acquired; and (ii) the compensation due to injurious affection, for the balance unacquired portion as well as the diminution in value of the affected adjoining lands owned by the applicant and the applicant's proposed development of all the adjoining lots together with the acquired lots that had been approved together as a single development. In respect of the proposed development, the respondent argued that the development order ('the DO') had lapsed whereas the applicant submitted that the DO approval was valid at the material time based on the letter from DBKL dated 25 February 2020. In the present case, two assessors were appointed to assist the court in deciding this land reference, the government assessor, and the private assessor.

Held:

(1) The judge was not bound by the opinion of the assessors. Nevertheless, the assessors were appointed to aid the judge in determining the objections of the applicant and in arriving at a fair and reasonable amount of compensation. Whilst the decision was the judge's alone, the judge had duly considered and given due weight to the opinion of the assessors, for they were expert valuers (see para 24).

(2) The private assessor made comparison with similar vacant parcels of commercial development land located in the neighbourhood. He analysed recent evidence of values of comparable properties in the vicinity and made adjustments for differences. He addressed the sales evidence by the respondent's valuer and the applicant's valuer and explained why certain evidence were preferred due to their close proximity and similar characteristics and others were less preferred because they were located further away or too far from the subject land. The private assessor then recommended a market value of RM11,000 per sqmt. Based on the above, the court found that a fair and reasonable compensation would be RM11,000 per sqmt. Therefore, the appropriate amount of compensation payable to the applicant in respect of the market value of the acquired portion of the subject land shall be RM655,545 (see paras 26 & 33).

(3) The court disagreed that the applicant's entire proposed development site was effectively land-locked and totally inaccessible due to the purported high traffic volume circulating at the Kampung Pandan Roundabout. The proposed development might possibly be classified as land-locked if there was no alternative access and both the afternoon and morning peak hours were deadlock. But neither was the case here. The assessors were of the view that an award of compensation for injurious affection was warranted due to the loss of the original frontage affecting access to the subject land. Having considered the recommendation of the assessors, the court found that an award based on 15% of the value of the land was fair and reasonable and an award based on the remainder land was appropriate, without including the adjoining lands. Accordingly, the fair and reasonable amount of compensation for injurious affection shall be RM670,568 (see paras 53–56, 64 & 68).

(4) In respect of the applicant's argument that the court must accept the evidence of the applicant's consultants rebutting the feasibility of the new access because the consultants were not cross examined, it ought to be noted that the Evidence Act 1950 ('the EA') did not apply to land reference proceeding. Further, the evidence of the consultants was tendered by way of affidavits. Based on s 2 of the EA, the EA did not apply to affidavits. In the premises, the court did not believe that the court must necessarily accept the evidence of the consultants simply because they were not cross-examined by the respondent. It might have

been helpful if the respondent had cross-examined the consultants. Be that as it may, the court had the assistance of the assessors and duly considered their advice in assessing the evidence proffered by the consultants (see paras 70, 74, 76 & 79).

(5) Based on para 6 of the DO approval letter, the DO approval would be valid so long as the building plan ('the BP') submission was completed, regardless of whether the BP submission was approved. In the present case, the BP submission was submitted timeously (ie on 14 January 2015), well before the expiry of the DO approval (ie one year from 20 November 2014). Further, the BP approval was still subsisting based on the DBKL's letter dated 25 February 2020, which stated that the BP approval was extended for four years from 11 February 2017 to 10 February 2021. Such validity period was before, within and after the period of acquisition and date of the *Gazette*. As the BP approval was still valid, the DO approval likewise was still valid (see paras 86, 88–90 & 93).

[Bahasa Malaysia summary

Pemohon adalah pemilik tanah seluas 466 meter persegi yang terletak di Kuala Lumpur ('tanah tersebut'). Sebahagian daripada tanah tersebut telah diambil secara wajib oleh Kerajaan Persekutuan untuk membina lebuh raya. Pentadbir tanah ('responden') telah memberi award seperti berikut: (a) pampasan sebanyak RM536,355 bagi nilai pasaran tanah yang diambil sebanyak 59.595 meter persegi berdasarkan nilai RM9,000 bagi setiap meter persegi; (b) 'injurious affection' sebanyak RM548,647 ke atas baki bahagian tanah yang tidak diambil seluas 406.405 meter persegi ('baki tanah') pada kadar 15% daripada nilai RM9,000 meter persegi; dan (c) pelbagai kos lain seperti kos penilai dan kos penempatan semula untuk penyewa. Perlu diingat bahawa tarikh penilaian yang terpakai dalam kes ini ialah 4 Februari 2019 iaitu tarikh penyiaran dalam Pemberitahuan *Warta* Kerajaan Persekutuan mengenai pengisytiharan yang dibuat di bawah s 8 Akta Pengambilan Tanah 1960 ('Akta tersebut'). Pemohon membantah award tersebut dan memohon agar bantahan tersebut dirujuk ke Mahkamah Tinggi. Pemohon berhujah bahawa award tersebut jelas rendah berkenaan dengan: (i) nilai pasaran bagi tanah yang diambil; dan (ii) pampasan akibat 'injurious affection', bagi baki bahagian yang tidak diambil serta penyusutan nilai tanah bersebelahan yang terjejas yang dimiliki oleh pemohon dan cadangan pembangunan semua lot bersebelahan yang dicadangkan oleh pemohon bersama-sama dengan lot-lot yang telah diambil yang telah diluluskan bersama sebagai pembangunan tunggal. Berkenaan dengan cadangan pembangunan tersebut, responden berhujah bahawa arahan pembangunan ('DO') telah luput manakala pemohon berhujah bahawa kelulusan DO adalah sah pada masa material berdasarkan surat daripada DBKL bertarikh 25 Februari 2020. Dalam kes semasa, dua orang penilai telah dilantik untuk membantu mahkamah dalam memutuskan rujukan tanah ini, penilai kerajaan, dan penilai persendirian.

Diputuskan:

(1) Hakim tidak terikat dengan pendapat penilai. Namun begitu, penilai telah dilantik untuk membantu hakim dalam menentukan bantahan pemohon dan dalam mencapai jumlah pampasan yang adil dan munasabah. Walaupun keputusan tersebut adalah keputusan hakim semata-mata, hakim telah mempertimbangkan dan memberikan pemberatan yang sewajarnya kepada pendapat penilai, kerana mereka adalah penilai pakar (lihat perenggan 24).

(2) Penilai persendirian membuat perbandingan dengan petak kosong tanah pembangunan komersial yang serupa yang terletak di kawasan kejiranan. Beliau menganalisa keterangan terkini tentang nilai hartanah setanding di sekitar dan membuat pelarasan untuk perbezaan. Beliau menangani keterangan jualan oleh penilai responden dan penilai pemohon dan menjelaskan mengapa keterangan tertentu diutamakan kerana jaraknya yang dekat dan ciri yang serupa dan yang lain kurang diutamakan kerana terletak lebih jauh atau terlalu jauh dari tanah tersebut. Penilai persendirian tersebut kemudiannya mengesyorkan nilai pasaran RM11,000 meter persegi. Berdasarkan perkara di atas, mahkamah mendapati pampasan yang adil dan munasabah ialah RM11,000 meter persegi. Oleh itu, jumlah pampasan yang sewajarnya perlu dibayar kepada pemohon berkenaan dengan nilai pasaran bahagian yang diambil daripada tanah tersebut ialah RM655,545 (lihat perenggan 26 & 33).

(3) Mahkamah tidak bersetuju bahawa keseluruhan tapak pembangunan yang dicadangkan pemohon telah dilingkungi daratan dan tidak boleh diakses sama sekali kerana jumlah trafik yang dikatakan tinggi yang melalui Bulatan Kampung Pandan. Pembangunan yang dicadangkan tersebut mungkin boleh diklasifikasikan sebagai dilingkungi daratan jika tiada akses alternatif dan kedua-dua waktu puncak tengahari dan pagi menemui jalan buntu. Tetapi kedua-duanya tidak berlaku di sini. Para penilai berpendapat bahawa award pampasan untuk 'injurious affection' adalah wajar kerana kehilangan laluan hadapan asal yang menjejaskan akses kepada tanah tersebut. Setelah mempertimbangkan syor oleh penilai, mahkamah mendapati bahawa award berdasarkan 15% daripada nilai tanah adalah adil dan munasabah dan award berdasarkan baki tanah yang tidak diambil adalah sesuai, tanpa memasukkan tanah bersebelahan. Sehubungan itu, jumlah pampasan yang adil dan munasabah untuk 'injurious affection' ialah RM670,568 (lihat perenggan 53–56, 64 & 68).

(4) Berkenaan dengan hujah pemohon bahawa mahkamah mesti menerima keterangan perunding-perunding pemohon yang menyangkal kebolehlaksanaan akses baru kerana perunding-perunding tersebut tidak diperiksa balas, perlu diingatkan bahawa Akta Keterangan 1950 ('AK') tidak terpakai untuk prosiding rujukan tanah. Selanjutnya, keterangan

perunding telah dikemukakan melalui afidavit. Berdasarkan s 2 AK, AK tidak terpakai kepada afidavit. Berdasarkan premis-premis tersebut, mahkamah tidak percaya bahawa mahkamah semestinya perlu menerima keterangan perunding-perunding tersebut semata-mata kerana mereka tidak diperiksa balas oleh responden. Ia mungkin membantu jika responden telah memeriksa balas perunding-perunding tersebut. Walau apa pun, mahkamah mendapat bantuan daripada penilai-penilai dan telah mempertimbangkan nasihat mereka dengan sewajarnya dalam menilai keterangan yang dikemukakan oleh perunding-perunding tersebut (lihat perenggan 70, 74, 76 & 79).

(5) Berdasarkan perenggan 6 surat kelulusan DO, kelulusan DO akan sah selagi mana penyerahan pelan pembangunan ('BP') selesai, tidak kira sama ada penyerahan BP telah diluluskan. Dalam kes ini, penyerahan BP telah diserahkan tepat pada masanya (iaitu pada 14 Januari 2015), sebelum tamat tempoh kelulusan DO (iaitu satu tahun dari 20 November 2014). Selanjutnya, kelulusan BP masih wujud berdasarkan surat DBKL bertarikh 25 Februari 2020 yang menyatakan kelulusan BP dilanjutkan selama empat tahun dari 11 Februari 2017 hingga 10 Februari 2021. Tempoh sah laku tersebut adalah sebelum, dalam masa dan selepas tempoh pengambilan dan tarikh *Warta*. Memandangkan kelulusan BP masih sah, kelulusan DO juga masih sah (lihat perenggan 86, 88–90 & 93).]

Cases referred to

Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat [2021] 4 MLJ 1; [2021] 3 CLJ 1, FC (folld)

Hwee Lai Company (M) Sdn Bhd & Ors v Tan Kim San & Sons Sdn Bhd & Anor [2001] MLJU 659; [2001] 7 MLRH 139,HC (refd)

Leong Kam Hoong v Pentadbir Tanah Daerah Seberang Perai Tengah Bukit Mertajam and another appeal [2001] 1 MLJ 186; [2000] 1 MLRA 737, CA (refd)

Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35; [1984] 1 CLJ Rep 289, FC (refd)

Pengerang Farm Sdn Bhd v Pentadbir Tanah Daerah Kota Tinggi [2017] MLJU 214, CA (folld)

Pentadbir Tanah Daerah Gombak v Huat Heng (Lim Low & Sons) Sdn Bhd [1990] 3 MLJ 282; [1991] 1 CLJ Rep 356; [1990] 2 MLRA 56, SC (refd)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 4 MLRA 554; [2017] 5 CLJ 526, FC (folld)

Legislation referred to

Evidence Act 1950 s 2

Land Acquisition Act 1960 ss 2, 8, 40A, 45(1B), (2), First Schedule, paras

1(1), 1(1A), 2, Third Schedule, para 5(1)
Rules of Court 2012

Ong Kheng Leong (Ghazi & Lim) for the applicant.
Natassa bt Zaini (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Quay Chew Soon JC:

INTRODUCTION

[1] This is a land reference matter arising from the compulsory acquisition of part of the subject land (as defined herein) under the Land Acquisition Act 1960 ('the Act'). The applicant in this Land Reference No WA-15–4–07 of 2020 is the owner of Lot No 487, PN 4460, Seksyen 90, Town and District of Kuala Lumpur, Wilayah Persekutuan ('subject land'). The respondent is the land administrator (as defined in s 2 of the Act).

[2] By an order of court dated 21 September 2020, another Land Reference Matter No WA-15–5–07 of 2020 ('other land reference') was transferred to my court and ordered to be heard together with this land reference proceeding that is before me. The land acquired in both cases were neighbouring lots owned by the same proprietor. I wrote a separate grounds of decision for the other land reference.

DOCUMENTS FILED

[3] Two assessors ('assessors') were appointed to assist me in deciding this land reference. Namely: (a) Puan Norhayati bt Awang from Jabatan Penilaian dan Perkhidmatan Harta, Wilayah Persekutuan, Kuala Lumpur ('government assessor'); and (b) Sr Ery Zuwardi bin Anuar from Intra Harta Consultants Sdn Bhd ('private assessor').

[4] In deciding this land reference, I considered, inter alia, the following:

(a) the report dated 24 June 2019 prepared by Puan Nornizam bt Mohd Jusoh from Jabatan Penilaian dan Perkhidmatan Harta, Kuala Lumpur ('government valuer') for the respondent and the rebuttal report dated 30 October 2020;

(b) the report dated 17 September 2020 prepared by Henry Butcher Malaysia Sdn Bhd ('private valuer') for the applicant and the rebuttal report;

(c) the government assessor's report and explanatory notes;

(d) the private assessor's report dated 7 May 2021 and explanatory notes dated 30 September 2021;

(e) the affidavit affirmed on 31 March 2021 by Ar Lucas Sin Whye Kwok ('Ar Lucas'), Managing Director of Arkitek MAA Sdn Bhd ('Arkitek MAA'), filed on behalf of the applicant;

(f) the affidavit affirmed on 31 March 2021 by Ir Chin Kar Keong ('Ir Chin'), Managing Director of Atur Trafik Sdn Bhd ('Atur Trafik'), filed on behalf of the applicant;

(g) written submission dated 2 August 2021, reply submission dated 19 August 2021 and further submission dated 12 October 2021, filed by counsel for the applicant; and

(h) written submission dated 2 August 2021 and further submission dated 12 October 2021, filed by senior federal counsel for the respondent.

BACKGROUND

[5] The subject land was compulsorily acquired by the federal government for purposes of 'Projek Lebuhraya Setiawangsa — Pantai Expressway (SPE) DUKE Fasa 3 (Lot Tambahan)'. The material date of valuation to determine compensation is the date of publication in the Federal Government *Gazette* Notification of the declaration made under s 8 of the Act. The applicable valuation date in the instant case is 4 February 2019 ('valuation date') vide *Warta* Kerajaan Persekutuan No 1675.

[6] The subject land is a piece of residential land approved for a commercial development. It is located to the east of Bulatan Kampung Pandan in Kuala Lumpur city centre. That is where the financial hub known as Tun Razak Exchange (TRX) is being developed a stone throw away due north west. The subject land is held under a 99-year leasehold interest expiring on 14 October 2076 (the unexpired term is approximately 57 years as at the valuation date).

[7] The total land area of the subject land is 466sqmt. Only a portion (approximately 12.8%) of the subject land was acquired. The portion of the subject land that was compulsorily acquired is 59.595sqmt. The unacquired portion or the remainder area of the subject land, after the compulsory acquisition, is 406.405sqmt ('remainder land').

LAND ADMINISTRATOR'S ENQUIRY

[8] At the land administrator's enquiry, the land administrator awarded the following:

(a) compensation of RM536,355 in respect of the market value of the acquired land of 59.595sqmt based on a value of RM9,000 per sqmt;

(b) injurious affection of RM548,647 on the balance of the unacquired portion of 406.405sqmt at 15% on a value of RM9,000 per sqmt; and

(c) other miscellaneous costs such as the valuers costs and relocation costs for the tenant (which is not the subject of this land reference).

[9] The applicant objected to the award of the land administrator and applied for the objection to be referred to the High Court. The grounds of objection, inter alia, are as follows:

(a) failed to adequately consider the principles for compensation under the law and/or under Schedule 1 of the Act as interpreted in their broadcast sense;

(b) failed to take into account the full potential commercial value of the whole development located on Lot 487 (ie the subject land) together with Lots 20041 (previously known as Lot 476), 488, 489, 490, PT 490 and 20060 all under Seksyen 90, Bandar Kuala Lumpur, Wilayah Persekutuan Kuala Lumpur (other lots);

(c) failed to reflect the full extent of the injurious affection/severance loss on the remaining land;

(d) failed to take into account the application to amend the category of land use on Lot 487 (ie the subject land) together with the other lots;

(e) valued after taking into account the matters or allegations that were not relevant under the law and/or under the First Schedule of the Act;

(f) failed to assess the compensation in totality by taking into account the effect of the acquisition on Lot 20060 (ie the land acquired under the other land reference);

(g) the total compensation does not put the owner in a financial position as if the land had not been acquired consistent with the principle of equivalence; and

(h) failed to take into account all aspects of the loss suffered following the acquisition of the land.

THE APPLICANT'S CLAIM

[10] There are two main heads of claim by the applicant in respect of the compensation payable. The applicant say that the award by the land administrator is manifestly low in respect of:

(a) the market value for the land acquired; and

(b) the compensation due to injurious affection, for the balance unacquired portion of Lot 487 (ie the subject land), as well as the diminution in value of the affected adjoining Lots 488, 489, 490, PT 490, 20041 (which all belong to the applicant) and the applicant's proposed development of all the adjoining lots together with the acquired lots that has been approved together as a single development.

[11] The: (a) compensation sum awarded by the land administrator; (b) valuation of the government valuer; and (c) amount claimed by the applicant (as per the valuation of the private valuer) respectively are summarised as follows:

Item	Award by Land Administrator	Valuation of Government Valuer	Valuation of Private Valuer
Land Value (acquired land area 59.595 sqmt)	RM536,355 (@ RM9,000 per sqmt)	RM387,367 (@ RM6,500 per sqmt)	RM833,300 (@ RM13,993 per sqmt)
Injurious Affection (remainder land area 406.405 sqmt)	RM548,647 (15% of RM9,000 per sqmt on 406.405 sqmt)	Nil	RM44,341,700 (100% of land area of 3,168.83 sqmt @ RM13,993 per sqmt
Total	RM1,085,002	RM393,367	RM45,175,000

THE LAW

[12] The statutory principles governing compensation is set out in the First Schedule of the Act. The matters to be considered in determining compensation, as specified in para 2 of the First Schedule of the Act, are as follows:

> 2. In determining the amount of compensation to be awarded for any scheduled land acquired under this Act there shall be taken into consideration the following matters and no others:
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> (a) the *market value* as determined in accordance with section 1 of this Schedule;
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> (b) any increase, which shall be deducted from the total compensation, in the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put;
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> (c) the damage, if any, sustained or likely to be sustained by the person interested at the time of the land administrator's taking possession of the land by reason of severing such land from his other land;

(d) the damage, if any, sustained or likely to be sustained by the person interested at the time of the land administrator's taking possession of the land by reason of the acquisition *injuriously affecting* his other property, whether movable or immovable, in any other manner;

(e) if, in consequence of the acquisition, he is or will be compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change; and

(f) where only part of the land is to be acquired, any undertaking by the State Authority or by the Government, person or corporation on whose behalf the land is to be acquired, for the construction or erection of roads, drains, walls, fences or other facilities benefiting any part of the land left unacquired, provided that the undertaking is clear and enforceable.

[13] The quantum of compensation to be awarded in respect of the acquired land is based on its market value at the date the declaration pursuant to s 8 of the Act is published in the *Gazette* (see para 1(1) of the First Schedule of the Act). The market value must be based on a rational enquiry of the value of the acquired land which is an objective assessment of all the surrounding circumstances.

[14] Ordinarily, the objective assessment would be the price that an owner who is willing and not obliged to sell might reasonably expect to obtain from a willing purchaser. It can be measured by reference to the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Regard may be given to the availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future.

[15] The main principles applicable in determining what is the market value of the land acquired was explained in the Federal Court case of *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35 at pp 37–38; [1984] 1 CLJ Rep 289 at pp 291–292 as follows:

> First, *market value* means the compensation that might be determined by reference to the *price which a willing vendor might reasonably expect to obtain from a wiling purchaser*. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both the vendor to sell and the purchaser to buy at the market price without any element of compulsion.
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> Secondly, *the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions.*
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> Thirdly, its *potentialities* must be taken into account. The nature of the land and the use to which it is being put at the time of acquisition have to be taken into account

A together with the likelihood to which it is reasonably capable of being put to use in the future eg the possibility of it being used for building and other developments.

Fourthly, in considering the nature of the land regard must be given as to whether its *locality is within or near a developed area*, its *distance to or from a town, availability of access road to* and within it or *presence of a road reserve indicating a likelihood of access to be constructed* in the near future, expenses that would likely be incurred in levelling the surface and the like.

B

Fifthly, *estimates of value by experts* and undoubtedly some evidence but *too much weight should not be given unless it is supported* by, or coincides with, other evidence.

C ...

The *safest guide is evidence of sales of similar lands of similar quality or position in the locality at or prior to the time of acquisition.* The *prices paid for such sales can be used as comparables subject to making allowances for all the circumstances.*

D

[16] The compensation awarded should as far as practicable put the claimant in the same financial position as he would have been in had there been no compulsory acquisition of his land (see the Supreme Court case of *Pentadbir Tanah Daerah Gombak v Huat Heng (Lim Low & Sons) Sdn Bhd* [1990] 3 MLJ E 282 at p 283; [1991] 1 CLJ Rep 356 at p 358; [1990] 2 MLRA 56 at p 57).

[17] The acquired land ought to be valued not only with reference to its condition at the time of acquisition but also its potential development value (see the Court of Appeal case of *Leong Kam Hoong v Pentadbir Tanah Daerah* F *Seberang Perai Tengah Bukit Mertajam and another appeal* [2001] 1 MLJ 186; [2000] 1 MLRA 737).

COMPARISON METHOD OF VALUATION

G

[18] In ascertaining the market value of the subject land, both parties have used the comparison method of valuation by comparing and adopting, as a yardstick, recent sales transactions of comparable properties in the locality. The characteristics, merits and demerits of these properties were noted and H adjustments for differences were then made to arrive at the market value of the subject land.

[19] The government valuer used three sales evidence while the private valuer used five sales evidence. None of the sales evidence used by the two I valuers is common sales. In other words, there are no common comparables relied upon by the government valuer and the private valuer.

[20] The assessors too adopted the comparison method of valuation. The reports of the assessors are annexed herewith.

[21] The role of assessors was explained by the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 at p 599; [2017] 4 MLRA 554 at p 582; [2017] 5 CLJ 526 at p 565 as follows:

> [117] In this new provision, the *assessors are expected to listen to the proceedings and evaluate the evidence*. They may also be *required to answer any questions of fact within their competence*, consonant with their role as advisors under sub-s 40(2) of the Act.
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> [118] At the end of the proceedings, they are *required to give their opinion as to the appropriate amount of compensation to be awarded* in a particular case.
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> [119] At the conclusion of the proceedings, it is requisite under s 40C of the Act that they *put their opinion in writing as to the appropriate amount of compensation to be awarded* in a particular case.
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> [120] It is then for the judge and the judge alone to deliberate on the issue of quantum before him, after taking into account all the issues.
>
> [121] In so doing, it is *not uncommon for the judge to give weight to the opinion of the assessors, for as experts in valuation of property, their opinion stand persuasively to be considered by the judge.*
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> [122] However, the assessors have no more role as soon as they put their opinion in writing. At the risk of tedium, it bears repeating that it is for the judge and the judge alone to exercise his mind and determine the issues before him, *based on the advice given by the assessors.*
>
> [123] It is reiterated that the opinion of the assessors is not binding on the judge. In the event the assessors disagree (as between themselves regarding the amount of compensation to be awarded in a particular case), the *judge may, after considering both opinions, elect to consider which of the two opinions in his view is appropriate* in the circumstances of the case. However, he is not bound by either one of the opinions. Should the judge finds himself in disagreement with the opinion of both the assessors, he is at liberty to decide the matter, giving his reasons for so doing.

[22] In the concluding portion of its judgment, the Federal Court made the following orders (at pp 619–620 (MLJ); 601–602 (MLRA); 585 (CLJ)):

> [224] ... It is ordered that:
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> (a) by s 40A, the matters are to be heard before a single judge. The court shall appoint *two assessors to assist the judge in determining the objection* made by the appellants against the amount of compensation awarded by the land administrator;
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> (b) at the end of the proceedings, the assessors are *required to give their opinions in writing as to the appropriate amount of compensation* to be awarded in this case pursuant to s 40C of the Act. The *assessors must give due consideration to all the heads of compensation claimed* by the appellant under the Act;
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> (c) the opinion of the assessors are to be recorded by the judge. The *judge has*

a duty to consider both of the opinions of the assessors. The judge is to exercise his mind in determining the amount of compensation to be awarded to the appellant, based on the principle of equivalence; and

(d) the provisions of sub-s 36(4) of the Act are to be given full effect. The judge shall not be bound to conform to the opinions of the assessors. In the event of any disagreement between the assessors with regard to the amount of compensation, the *judge may elect to consider which of the two opinions in his view is appropriate* in the circumstances of the case. The judge is also at liberty to depart from the opinion of either of the assessors and decide on the reasonable amount of compensation to be awarded to the appellant by giving reasons for so doing.

[23] Arising from *Semenyih Jaya*, a practice direction was issued by the Chief Judge of Malaya vide Arahan Amalan Hakim Besar Malaya Bil 1 Tahun 2017 dated 6 June 2017. It outlines the procedure that is to be adhered to in land acquisition cases by the land reference court.

[24] I am not bound by the opinion of the assessors. Nevertheless, the assessors were appointed to aid me in determining the objections of the applicant and in arriving at a fair and reasonable amount of compensation. Whilst the decision is mine alone, I have duly considered (which I am duty bound to do) and given due weight to the opinion of the assessors, for they are expert valuers.

DECISION ON MARKET VALUE

[25] The government assessor recommended RM10,000 per sqmt while the private assessor recommended RM11,000 per sqmt as compensation. Having considered both opinions, my view is that compensation of RM11,000 per sqmt is fair and reasonable. I find the opinion of the private assessor to be appropriate in the circumstances and elected to follow the same.

[26] The private assessor made comparison with similar vacant parcels of commercial development land located in the neighbourhood. He analysed recent evidence of values of comparable properties in the vicinity and made adjustments for differences. He addressed the three sales evidence used by the government valuer and the five sales evidence used by the private valuer. He discussed why some of the sales evidence are more suitable and others less so. He explained why certain sales evidence were preferred due to their close proximity and similar characteristics. And others were less preferred because they were located further away or too far from the subject land. He noted the differences in the sales evidence and made due allowance for them.

[27] The private assessor opined that in valuing the subject land, it is

inappropriate to rely heavily on one comparable and rule out the importance of other comparable properties. All the comparable properties ought to be considered in determining the market value. That said, the private assessor selected two sales evidence from the government valuer and two sales evidence from the private valuer. I concur with such selection on the basis that they are more suitable or closer comparables.

[28] Of the three sales evidence used by the government valuer, the private assessor selected Comparable 1 (ie Lot 484, Jalan Shelly, Cheras) and Comparable 3 (ie PT 8, Jalan Yew). Both are located in close proximity to the subject land. Comparable 2 (ie Lot 122, Jalan Dua, Jalan Chan Sow Lin) was not adopted due to its relatively further location. Moreover, its location is not comparable to the locality of the subject land.

[29] Of the five sales evidence used by the private valuer, the private assessor selected Comparable 1 (ie No 2 and 4, Jalan Kemuning) and Comparable 2 (ie No 28, Jalan Utara). They are situated close to and shares similar characteristics with the subject land. Both were adopted as they were the most recent sales evidence, when contrasted with Comparable 3 (ie Lot 397, Jalan Inai).

[30] Comparable 4 (No 14, Lorong Liew Weng Chee) and Comparable 5 (No 105, Persiaran LIDCOL) were not adopted as they were located too far from the subject land.

[31] The private assessor made various adjustments to account for differences with regards to factors such as the time of the transaction, size of the land, location and tenure of the land. The adjustment factors are within the professional expertise and technical purview of the private assessor, and I have no reason to differ.

[32] A summary of the valuation and the adjustments made by the private assessor is as follows:

Particulars (cf subject land)	Comparable 1 of Govt Valuer	Comparable 3 of Govt Valuer	Comparable 1 of private valuer	Comparable 2 of private valuer
Address	Lot 484, Jin Shelly, Cheras	PT 8, Jin Yew	No 2 & 4, Jin Kemuning	No 28, Jin Utara
Transaction date	22 December 2017	26 March 2015	24 October 2017	4 October 2017
Land area	26,665.59 sqmt	5,825 sqmt	1,171.04 sqmt	924.48 sqmt

Price (per sq m)	RM5,381.96	RM9,442.06	RM21,527.48	RM22,715.47
Time (cf 4 February 2019)	1.12 yr earlier	3.87 yr earlier	1.28 yr earlier	1.34 yr earlier
Adjustment	0%	10%	0%	0%
Size (466 sq m)	57.22 x larger	12.5 x larger	2.51 x larger	1.98 x larger
Adjustment	30%	10%	0%	0%
Location (Kampung Pandan)	Jalan Peel	Jalan Tun Razak	Jalan lmbi	Jalan lmbi
Adjustment	20%	20%	- 20%	- 20%
Shape (Trapezoidal)	Regular	Regular	Regular	Regular
Adjustment	- 5%	- 5%	- 5%	- 5%
Tenure (99 yr leasehold)	Freehold	Freehold	Freehold	Freehold
Adjustment	- 10%	- 10%	- 10%	- 10%
Total Adjustment	35%	25%	- 35%	- 35%
Adjusted value (per sq m)	RM7,265	RM11,802	RM13,998	RM14,766

[33] Taking into account the average of the adjusted values above, the private assessor recommended a market value of RM11,000 per sqmt. It is my finding that a fair and reasonable compensation would be RM11,000 per sqmt. I determine that the appropriate amount of compensation payable to the applicant in this land reference in respect of the market value of the acquired portion of the subject land shall be RM655,545 (ie 59.595sqmt @ RM11,000 per sqmt).

THE APPLICANT'S SUBMISSION

[34] The applicant contends that Comparable 1 of the government valuer is not reliable as a comparable because it was a related party transaction. It was transacted between Lembaga Tabung Angkatan Tentera ('LTAT') (the vendor) and Mutiara Rini Sdn Bhd (the purchaser) in which the purchaser is a wholly-owned subsidiary of Boustead Holdings Bhd ('BHB'). LTAT, being the vendor of this deal, is the major shareholder of BHB. The applicant argues that a sale by the ultimate holding company to its subsidiary and an intra-group sale

is not reflective of the actual market value, given the fact that concessions within the group would be given.

[35] I do not think that is necessarily so. Firstly, it is not automatically the case that a related party transaction would not be an arms-length transaction. It was not established that concessions were actually given in Comparable 1.

[36] Secondly, BHB is a public company that is listed on Bursa Malaysia. I take judicial notice that the Listing Requirements of Bursa Malaysia contain stringent rules pertaining to related party transaction (see Chapter 10 entitled 'Transactions' and Part E thereof entitled 'Related Party Transactions'). The requirements include the following:

(a) interested parties are prohibited from deliberating and voting on the transaction. Thus, the transaction must be approved by independent directors and non-interested parties;

(b) an independent adviser must be appointed. The independent adviser must comment: (i) whether the transaction is fair and reasonable so far as the shareholders are concerned; and (ii) whether the transaction is to the detriment of minority shareholders. The independent adviser must advise minority shareholders on whether they should vote in favour of the transaction; and

(c) where the transaction involves real estate, a valuation report must be commissioned to substantiate the transaction price. Although I have no personal knowledge whether this was done in Comparable 1. Nonetheless given the public scrutiny on related party transactions and the corporate governance requirements imposed by the regulators, I would expect the transaction price to be justifiable and reflective of market value.

[37] Next, the applicant contends that Comparable 1 is not suitable given the fact that it is approximately 57 times bigger than the subject land and is of a different class. However, the private assessor did make due allowance and appropriate adjustment for such difference. The fact remains that Comparable 1 is in closest proximity to the subject land.

[38] Finally, the applicant takes issue with the fact that Comparable 3 of the government valuer is more than two years from the valuation date (ie 4 February 2019). Comparable 3 was transacted on 26 March 2015, which is approximately four years earlier than the valuation date.

[39] It is true that particular consideration ought to be given to 'the last transaction on the scheduled land' within two years from the relevant valuation

A date. Paragraph 1(1A) of the First Schedule of the Act (titled 'Principles relating to the determination of compensation') reads:

> In assessing the market value of any scheduled land, the valuer may use any suitable method of valuation to arrive at the market value provided that regard may be had to the prices paid for the recent sales of lands with similar characteristics as the scheduled land which are situated within the vicinity of the scheduled land and with particular consideration being given to the last transaction on the scheduled land within two years from the date with reference to which the scheduled land is to be assessed under subparagraph (1).

[40] It must be pointed out that the aforesaid provision speaks of a transaction on the scheduled land or acquired land itself. Here, no sales evidence was produced of any transaction involving the subject land, let alone one that is within the said two years time frame.

[41] In any event, I do not see any prohibition against using a sales evidence that is outside of the said two years time period. My view is that such sales evidence may be used, with appropriate adjustment to account for the time difference.

[42] I am guided by the apex court pronouncement that the market value rule in para 1 of the First Schedule of the Act must not be construed strictly. In *Amitabha Guha (as beneficiary for the estate of Madhabendra Mohan Guha) v Pentadbir Tanah Daerah Hulu Langat* [2021] 4 MLJ 1 at p 22; [2021] 3 CLJ 1 at p 25, the Federal Court said:

> [47] In the light of the ruling of this court in *Semenyih Jaya*, the *market value rule in para 1 of the First Schedule must not be construed strictly*. As such, *acquisition comparables may also be considered* in assessing market value provided that *regard be had to sale comparables transacted within the last two years* of the date of the publication of (i) a preliminary notice of likely acquisition under s 4 in Form A; and (ii) a declaration of intended acquisition under s. 8 in Form D, as the case may be.

[43] In *Semenyih Jaya*, the Federal Court said (at p 617 (MLJ); 582 (CLJ)):

> [211] *It needs emphasis that the market value rule in para 1 must not be construed rigidly.* It is noteworthy that para 1 of the First Schedule itself does not define the term market value. Instead, it enumerates the process of determining market value of the land. Apart from the price of comparable sales of the acquired land in the vicinity, the conditions of the land form a basis in the computation of market value. Thus any restrictions in title, any specification and category in the land use ought to be considered in determining the market value of the land. Similarly, any improvement made by the owner to the land (subject to the restriction imposed in para 1) and the existence of any building on the subject land are also to be considered.

CLAIM FOR INJURIOUS AFFECTION

[44] The other head of claim by the applicant is for compensation due to injurious affection. It is noted that this head of claim is based not only on the remainder land. As mentioned earlier, only a fraction (approximately 12.8%) of the subject land was acquired. The total land area of the subject land is 466sqmt. The portion of the subject land that was compulsorily acquired is 59.595sqmt. The remainder land area, after the compulsory acquisition, is 406.405sqmt.

[45] Notwithstanding, the applicant claims for diminution in value of the adjoining Lots 488, 489, 490, PT 490, 20041 ('adjoining lots'), all of which belong to the applicant. The total land area of the adjoining lots and the remainder land is 3,168.83sqmt.

[46] The premise of the applicant's claim is that the subject land was to be amalgamated and developed together with the adjoining lots for a commercial development of a proposed 19 storey office building ('proposed development'). The proposed development has obtained a development order dated 20 November 2014 ('development order') from the local authority, Dewan Bandaraya Kuala Lumpur ('DBKL'). The applicant had paid premium of RM648,597 for the conversion to commercial development. As a consequence of the compulsory acquisition of a portion of the subject land, the adjoining lots have been severely impacted.

[47] The land administrator awarded compensation for injurious affection but only on the remainder land area (ie 406.405 metres). 15% of the value of the land (which was determined as RM9,000 per sqmt by the land administrator) was awarded 'memandangkan projek yang terlalu hampir dengan lot tuan tanah dan juga kesukaran laluan keluar masuk'. This figure of 15% appears to approximate the area of the acquired portion of the subject land, which is about 12.8%. Thus, 15% of RM9,000 per sqmt multiplied by 406.405 metres results in a sum of RM548,647 awarded by the land administrator.

[48] The government valuer did not provide any compensation for injurious affection. This was on the grounds that the remainder land still has alternative access through Jalan Kampong Pandan and the size of the remainder land is still economically feasible to be developed. Further, that the development order had expired.

[49] The applicant say that the land administrator's award is manifestly low and erroneous for the following reasons:

(a) it did not take into account the fact that the subject land is part of a single development with the adjoining lots;

(b) the land administrator and the government valuer failed to consider that all the adjoining lots belong to the applicant as a single development. With the compulsory acquisition, the proposed development now has no proper access to serve the proposed development given the Traffic Assessment report by Atur Trafik and the affidavit evidence of both consultants to the proposed development, Ir Chin and Ar Lucas ('consultants'), which stands unrebutted at the hearing; and

(c) the government valuer said that there was no injurious affection on the basis that the remainder land had access through a new access at Jalan Kampong Pandan and the remainder land was still economical to be developed. This is erroneous given the evidence by the consultants on the fact that the proposed development is no longer feasible due to the compulsory acquisition and construction of flyover being constructed on the acquired land and the access given.

[50] The applicant argues that as a consequence of the compulsory acquisition, the remainder land and the adjoining lots have been left incapable of development as planned. They say that:

(a) regardless of the status of the development order and the building plan approval, the intention is clear that the subject land and the adjoining lots are intended to be developed as a single development;

(b) the intention of this single development was made known even as far back as year 2012 in Wah Seong Corp Bhd's announcement on Bursa Malaysia;

(c) any land owner would logically sell the whole land together as one single development site instead of disposing it as individual terrace parcel plot, which defy the highest and best use of the combined land;

(d) therefore, it will be unfair to ignore the reasons set forth above and only consider the subject land and disregard the adjoining lots. Even if any development order or building plan approval has lapsed, it can be renewed as evidenced in the building plan renewal from 2017–2021; and

(e) the fact that the proposal was made on Bursa Malaysia as far as in year 2012, together with the development order and the building plan approval prove that the subject land and the adjoining lots are meant to be developed as a single commercial development from day one.

[51] The applicant contends that the remainder land, together with the adjoining lots, suffered severe damage due to the following reasons:

(a) the subject land together with the adjoining lots have been approved as a single development site for a commercial development on 20 November 2014. The compulsory acquisition has led to serious consequence on its accessibility and environmental issue which has greatly affected the viability of the approved proposed commercial development;

(b) previously approved commercial development for an office building is no longer feasible as the acquired portion is for the purpose of constructing highway structures that run parallel along Jalan Kampung Pandan, which was the original frontage of the subject land that was planned as the ingress of the approved proposed commercial development. With the original frontage, the proposed development would be overlooking the RSGC, TRX and KLCC;

(c) as a result of the highway structures obstructing the original frontage, the entire proposed development site ie the subject land and the adjoining lots are now without proper access resulting in a landlocked, totally inaccessible situation; and

(d) the debatable unofficial access via PT 490 (initially a road reserve) to another exit at the southern boundary of Lot 490 is highly disputable as per traffic impact assessment conducted by Atur Trafik, a professional traffic consultant.

[52] It is the applicant's case that as a consequence of the compulsory acquisition, the economic value of the remainder land together with the adjoining lots will be totally affected. Hence, the applicant claims 100% for the loss in value of the remainder land and the adjoining lots as follows:

(a) affected land area = 3,168.83sqmt (excluding acquired land);

(b) market value = RM13,993.08 per sqmt;

(c) injurious affection claim of 100% = RM13,993.08 per sqmt;

(d) claim for injurious affection = 3,168.83 sqmt x RM13,993.08 per sqmt; and

(e) claim of diminution value due to injurious affection = RM44,341,700.

DECISION ON INJURIOUS AFFECTION

[53] The assessors were of the view that an award of compensation for injurious affection is warranted due to the loss of the original frontage affecting access to the subject land. They advised that a claim based on 15% of the value of the land is adequate (and not 100% as claimed by the applicant). Further, that the claim be assessed based on the area of the remainder land (and not on the adjoining lots as claimed by the applicant). According to the Federal Court

in *Semenyih Jaya*, the judge has a duty to consider both of the opinions of the assessors.

[54] Having considered the recommendation of the assessors, my findings on injurious affection are these. First, an award based on 15% of the value of the land is fair and reasonable. Instead of 100% of the value of the land (as claimed by the applicant). Second, an award based on the remainder land is appropriate. Without including the adjoining lots (as claimed by the applicant).

[55] Accordingly, I determine that a fair and reasonable amount of compensation payable to the applicant in this land reference for injurious affection shall be RM670,568. Which is calculated as follows: 15% of RM11,000 per sqmt (ie the market value of the land) multiplied by 406.405 metres (ie the area of the remainder land). My reasons are as follows.

[56] I do not accept that the applicant's entire proposed development site (ie the subject land and the adjoining lots) is effectively land-locked and totally inaccessible as alleged due to the purported high traffic volume circulating at the Kampung Pandan Roundabout. The subject land enjoyed direct access from Jalan Kampung Pandan. However, due to the compulsory acquisition of a portion of the subject land, it has been obstructed by the highway structures.

[57] As an alternative, the access is to be shifted to Lot 490 which is a road reserve. Lot 490 also belongs to the applicant. LLM (Lembaga Lebuhraya Malaysia) also proposed that the access road be shifted to Lot 490. This proposal has already been approved by DBKL.

[58] The Setiawangsa Pantai Expressway (SPE) concessionaire has proposed amended Right-In-Right-Out (RIRO) at the Kampung Pandan Roundabout. The applicant engaged Atur Trafik to carry out a traffic impact assessment study ('TIA') on the proposed shifting of junction from the subject land to Lot 490. The TIA claims that the proposed development will create high traffic volume circulating at the Kampung Pandan Roundabout. But this is a ten year forecast study on the junction capacity performances in the Impact Assessment Year (IAY 2030) from the date of assessment ie 7 July 2020.

[59] The private assessor felt that the TIA did not take into account future roadways and highways proposed in the vicinity of the subject land. But Atur Trafik said they did. According to them, they were also the traffic consultant for the TRX project and has relevant first-hand information on the future traffic circulation.

[60] The private assessor opined that the traffic assessment should have been

taken as at the valuation date (ie in 2019). However due to traffic being much reduced by the Movement Control Order (MCO) that was imposed in March 2020 as a result of the Covid-19 pandemic, the TIA used traffic counts conducted in year 2015 and 2016. As such, it may not necessarily present an accurate picture.

[61] In response, Atur Trafik explained that the reason no assessment was taken at the point of the valuation date is because good traffic data thereabout was not available to them. They contend that there is no need to use any particular set of data dated in 2019 for their future traffic demand forecasting.

[62] The private assessor was of the view that the TIA failed to consider that in 2015 and 2016, there were no major developments in the vicinity of the subject land. The TIA also failed to highlight that in 2019, there was a proposal from the NAZA Group to construct a multi-level roadway to ease Jalan Tun Razak south bound traffic. See the announcement dated 12 April 2019 by the NAZA Group (which is attached to the private assessor's Explanatory Notes) which reads:

> New Multi-Level Roadway Poised To Ease Jalan Tun Razak South-Bound Traffic
>
> ...
>
> Being the main arterial road linking one of Kuala Lumpur's busiest districts to suburbs to the north and south of the city, Jalan Tun Razak faces a *prevalent issue* daily. *Traffic congestion*, caused by interchanges in this area, can get unbearable for daily commuters especially during rainy seasons and is expected to *worsen once the TRX City development is fully functional.*
>
> ...
>
> Due to these *ongoing congestion issues*, Dewan Bandaraya Kuala Lumpur *(DBKL) has taken the initiative to implement the TRX External Roads in a bid to ease the current traffic conditions along Jalan Tun Razak while also facilitating effective traffic dispersal from the future TRX City and incoming traffic from Bukit Bintang and Kampung Pandan.*
>
> Naza Engineering & Construction (Naza EC) Sdn Bhd, a subsidiary of private-held Bumiputera conglomerate *Naza Group of Companies, bid for and won the tender for best Design & Build in infrastructure plan to construct the 2.5km elevated roadway* that will complement the existing number of lanes on Jalan Tun Razak, which is a prime exit point from the city centre.
>
> The *project by Naza EC will support current traffic flow and accommodate the growing vehicle population* along Jalan Tun Razak, *such as when the nearby TRX City is completed and fully operational.*
>
> The first approach single-lane ramp starts near Jalan Langgak Golf picking up traffic heading towards Bulatan Kampung Pandan and merges with the Jalan Bukit Bintang two-lane ramp which starts near Jalan Delima before the Jalan Tun

Razak-Jalan Bukit Bintang intersection to become a three-lane carriageway section forming the mainline of the external road. Another ingress ramp connects to the multi-level roadway from TRX City. The ramps will then connect motorists to Bulatan Kampung Pandan, Maju Expressway (MEX) and Setiawangsa Pantai Expressway (SPE) north-bound and south-bound via separate ramps. An additional two ramps are underway to connect Jalan Kampung Pandan overpass and MEX towards the south entrance of TRX City.

The TRX External Roads is a long-term solution by DBKL to the state of traffic congestion that motorists currently face on a daily basis along Jalan Tun Razak and the surrounding roads. Once the traffic dispersal project is completed, it is predicted to accommodate up to 48,000 vehicles daily during peak hours, according to the Traffic Impact Assessment (TIA).

[63] According to the private assessor, circa 2015 and 2016, Tun Razak Exchange (TRX) is still in preliminary stage. The TIA also failed to take into account the massive infrastructure works undertaken by TRX where the road networks connect SMART Tunnel, Jalan Tun Razak, Jalan Kampung Pandan, MEX and the future DUKE highway. It is anticipated that the subject land will eventually benefit from these future developments and infrastructure works.

[64] The private assessor advised that the TIA did not incorporate SPE which may ease the traffic congestion. The traffic congestion only impacted afternoon (PM) peak hours based on the 2016 traffic volumes. The morning (AM) peak hours are still manageable. The proposed development might possibly be classified as land-locked if there is no alternative access and both PM and AM peak hours are deadlock. But neither is the case here.

[65] In response, Atur Trafik said that the proposal by NAZA Group was factored into the TIA, although not specifically mentioned. Further, that TRX infrastructure works were also taken into consideration.

[66] The respondent argued that the TIA has adopted micro-simulation traffic models using comparison method to analyse traffic counts in 2015 and 2016, which is irrelevant. Such method is not suitable to give significant result accurately, thus rendering the TIA unreliable. Further, the respondent suggest that the TIA may not be balanced as Atur Trafik is engaged by the applicant to bolster its case.

[67] According to the respondent, the new proposed RIRO is safer compared to the original RIRO that was located at the curve. Moreover, there will be a dedicated lane in and out constructed on the right side of the roadways at the proposed RIRO to ensure smooth access over the proposed development and another one dedicated lane on the left side of the roadways straight to MEX highways to avoid traffic congestion and reduce the traffic volume at the

junction. As such, the applicant's allegation that the proposed RIRO is inconvenient and would result in traffic congestion is untenable.

[68] Having considered the opinion of the assessors, I am satisfied that the proposed development still has an alternative access. It is therefore not land-locked. The TIA purports to predict the effectiveness of the alternative access road. But it may not present an accurate forecast as it is based on traffic counts in year 2015 and 2016. And also in light of future developments and infrastructure works.

THE RESPONDENT DID NOT CROSS-EXAMINE THE CONSULTANTS

[69] According to the applicant, the evidence proferred by its consultants (ie Arkitek MAA and Atur Trafik) shows that the proposed development will no longer be feasible, following the compulsory acquisition. The adjoining lots are effectively rendered commercially worthless for the proposed development. The proposed access through Lot 490 is only meant to cater for the existing site with a few dilapidated dwellings with little or no volume of traffic.

[70] The applicant contends that the evidence of its consultants rebutting the feasibility of Lot 490 as the new access must be accepted by this court as both consultants were present in court at the hearing, and their affidavit evidence is taken as evidence of the matters stated. The applicant argues that as the consultants were not cross examined, although offered, their evidence stands uncontroverted and must be accepted.

[71] The applicant cited the High Court case of *Hwee Lai Company (M) Sdn Bhd & Ors v Tan Kim San & Sons Sdn Bhd & Anor* [2001] MLJU 659 at p 9; [2001] 7 MLRH 139 at p 142 which said:

> I was surprised to note that the plaintiffs did not challenge this evidence. Instead there was absolutely no cross examination on this by the plaintiffs. I do not have to repeat what has been set as trite law that if a party fails or refuses or neglects to cross examine a witness on a vital piece of evidence, the court will not be in a position to know if the omission was deliberate or due to inadvertence. The court must find that counsel knew best how to conduct his case and that he did not cross-examine for reasons best known to himself. However, if no sufficient or satisfactory explanation is given for the omission to cross examine then it is the duty of the court to hold such omission against the party who failed to cross examine. Such evidence therefore stands unchallenged and untainted. The court must accept that evidence.

[72] I note that the aforesaid authority was in the context of a trial conducted in the High Court. Here however, the proceedings before me is not a trial as such. It is a land reference pursuant to the Act. The objections of the

A applicant were referred to me for determination. In hearing the applicant's objections, I operate as a land reference court specially constituted under the provisions of the Act.

B **[73]** The applicable procedural and evidential rules in land reference cases are specially provided for in the Third Schedule of the Act. In the circumstances, I do not think the strict rules of evidence and trial process necessarily apply. At least, not in relation to having to expressly put one's case to the opponent's material witnesses when they are under cross-examination or omitting to cross-examine them.

C

[74] Clearly, the Evidence Act 1950 does not apply to land reference proceeding. Section 2 of the Evidence Act reads: 'This Act shall apply to all *judicial proceedings* in or before any court, *but not to affidavits* presented to any court or officer nor to proceedings before an arbitrator'.

D

[75] This land reference proceeding is not a judicial proceeding as such. I do not sit alone, but with two assessors appointed in accordance with the Act.

E **[76]** Moreover, the evidence of the consultants were tendered by way of affidavits. This is pursuant to para 5(1) of the Third Schedule of the Act which reads: 'Except in the case of a valuer, the evidence of any other person shall be adduced by way of affidavits'. As referred to above, the Evidence Act does not apply to affidavits.

F

[77] If anything, it would be the Rules of Court 2012 that would apply in this land reference proceedings. Under s 45(2) of the Act, 'the law for the time being in force relating to civil procedure shall apply to all proceedings before the Court under this Act'. And under s 45(1B) of the Act, 'The Rules Committee appointed under the Courts of Judicature Act 1964 may amend the provisions of the Third Schedule relating to the procedure to be followed by the Court in all proceedings under this Act'.

G

H **[78]** I rely on the Court of Appeal case of *Pengerang Farm Sdn Bhd v Pentadbir Tanah Daerah Kota Tinggi* [2017] MLJU 214 which said:

> In this connection, it is important to appreciate that the court hearing an application under s 37 of the LAA 1960 is in effect a *land reference court specially constituted under the provisions of the LAA 1960*. First, the court *must apply the procedural and evidential rules which are set out in the Third Schedule.* Second, the court is enjoined to apply the principles relating to the determination of compensation enumerated in the First Schedule. Third, where the objection before the court relates to the amount of compensation, the *court is required to appoint two assessors for the purpose of assisting the judge in determining the objection and in arriving at a fair and reasonable amount of compensation*: s 40A of the LAA 1960. As

I

such, the *constitution of the land reference court is different from that of a civil court adjudicating on civil matters.*

[79] In the premises, I do not believe that I must necessarily accept the evidence of the consultants simply because they were not cross-examined by the respondent. It might have been helpful if the respondent had cross-examined the consultants. Be that as it may, I had the assistance of the assessors and duly considered their advice in assessing the evidence proferred by the consultants.

[80] It bears reiterating the vital role and duties of the assessors as propounded by the Federal Court in *Semenyih Jaya* as follows (at pp 611–612 (MLJ); 577–578 (CLJ)):

> [183] It has to be reiterated that s 40C of the Act is mandatory. What then is the significance of s 40C? Section 40C reflects the *vital role and duties of assessors* who sit with a High Court judge in a land reference proceeding.
>
> [184] The law in s 40C of the Act *imposes on the assessors a duty to consider the various heads of compensation claimed by the interested persons and form their expert opinion*. It is a statutory safeguard to protect the landowners and interested persons in matters comprising compensations.
>
> [185] Section 40C of the Act also makes it *mandatory that the opinion of the assessors on the heads of compensation be given in writing*. It has to be remembered that the valuation of the land and assessment of compensation arising out of the acquisition are not a mathematical process. The requisites of valuation and assessment are pertinent, to show that the opinion given on the amount of compensation is well founded.
>
> [186] Another important requirement imposed by s 40C of the Act is that the written opinion of assessors is to be recorded by the judge. In the circumstance, the *judge has to be satisfied that the assessors had, in forming their opinions, considered all matters that ought to be considered* under the Act. This is another statutory safeguard under art 13 of the Federal Constitution.
>
> [187] The importance of s 40C of the Act also lies in the transparency of the decision-making process. In the words of Viscount Simon LC in *Richardson v Redpath, Brown & Co Ltd*:
>
> > It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the judge's conclusion, for the latter to inform the parties before him what is the advice which he has received.
>
> The opinion of the assessors serves to inform the interested persons that the *court has considered all issues brought before the court and sought professional views before arriving at its decision*. The provision in s 40C of the Act is also significant in view of the bar to appeal provided for in sub-s 49(1) of the Act.
>
> [188] The written opinion of the assessors also serves to facilitate the appellate courts in the event an appeal is filed. The advice given by the assessors in the High

A Court must be made available to the appellate courts.

[81] Upon perusal of their reports, I was not satisfied that the assessors had adequately covered the issue of injurious affection. In line with the aforesaid remarks of the Federal Court, I requested them to provide a supplemental report. They duly furnished explanatory notes, providing their professional views on this issue. I conveyed the same to the parties and invited further submission. All these were duly considered in arriving at my decision.

[82] As discussed earlier, the evidence of the consultants may not be entirely accurate. Essentially they are saying that the proposed development is land-locked and no longer viable due to the shifting of the proposed access road. They contend that the proposed shifting of junction from the subject land to Lot 490 will cause a congestion during peak hours. This based on the traffic forecasts and projections vide the TIA.

[83] But forecasts and projections, by its very nature, are not certain and definite. It might even border on being speculative. As observed by the Federal Court in *Ng Tiou Hong*, too much weight should not be given to the estimates, forecasts and projections of experts or consultants, unless it is supported by other evidence.

[84] It seems to me that traffic congestion in the vicinity of the proposed development is a perennial problem. Moreover, the traffic situation may be in a state of flux and could change, depending on future infrastructure works and other developments. As such, I find that the proposed development site is not land-locked and totally inaccessible as alleged due to the purported high traffic volume.

[85] I would mention that the applicant invited me to visit the site of the proposed development. But I did not think that was necessary in order to reach a decision. The materials made available to me (the valuation reports, sketch plans, diagrams, maps, photographs, video recording) were quite sufficient.

VALIDITY OF THE DEVELOPMENT ORDER

[86] Before concluding, I will deal with the respondent's contention that the development order had lapsed. On this issue, I agree with the applicant that the DO approval was valid at the material time based on the letter from DBKL dated 25 February 2020.

[87] The chronology of events in connection with the issue of the validity of the development order is as follows:

20 November 2014	Arkitek MAA obtained the Development Order ('DO') approval.
14 January 2015	Arkitek MAA submitted the Building Plan ('BP') for approval.
22 January 2016	Arkitek MAA applied for extension of the DO approval.
12 February 2016	Arkitek MAA obtained the BP approval.
14 March 2016	Arkitek MAA received the extension of the DO approval until 19 May 2016, through a letter dated 26 February 2016.
24 July 2018	Arkitek MAA received a reminder from DBKL on the compliance requirement for KMB submission, through a letter dated 12 June 2018.
8 August 2018	Arkitek MAA submitted a response letter to DBKL through its letter dated 1 August 2018.
29 November 2019	Arkitek MAA applied for extension of the BP approval.
25 February 2020	DBKL granted the extension until 10 February 2021.

[88] According to para 6 of the DO approval letter, the approval is valid for one year unless an application for approval of BP has been submitted. It reads:

> Perintah Pembangunan ini adalah sah selama satu tahun dari tarikh ianya dikeluarkan melainkan kelulusan Pelan Bangunan telah dikemukakan ke ... Dewan Bandaraya Kuala Lumpur dalam tempoh tersebut. Jika gagal berbuat demikian, kelulusan perancangan ini akan luput secara automatik. Pemohon dikehendaki melanjutkan Perintah Pembangunan sebelum tamat tempoh sah Perintah Pembangunan.

[89] I understand this to mean that the DO approval will be valid so long as the BP submission is completed, regardless whether the BP submission is approved. If the BP submission is not filed on time, an application may be made to extend the DO approval.

[90] In the present case, the BP submission was submitted timeously (ie on 14 January 2015), well before the expiry of the DO approval (ie one year from 20 November 2014).

[91] The respondent relies on a letter dated 23 May 2019 from DBKL to Jabatan Penilaian dan Perkhidmatan Harta Kuala Lumpur. It states:

> pihak pemaju masih tidak mematuhi syarat-syarat Pelan Bangunan yang telah ditetapkan. Ini bermakna kelulusan perintah pembangunan dan pelan bangunan bagi cadangan pembangunan di lot tersebut telah terbatal.

[92] However, that letter was exchanged between DBKL and Jabatan Penilaian. The applicant was not privy to it. Curiously DBKL has never issued any letter to the applicant informing on cancellation of the DO approval following Arkitek MAA's appeal letter on 8 August 2018. Instead on 25 February 2020 (ie subsequent to the aforesaid 23 May 2019 letter between DBKL and Jabatan Penilaian), DBKL extended the BP approval until 10 February 2021.

[93] It seems to me that the validity of the DO approval is determined by the validity of the BP submission/approval. The BP approval was still subsisting based on DBKL's letter dated 25 February 2020, which stated that the BP approval is extended for four years from 11 February 2017 to 10 February 2021. Such validity period is before, within and after the period of acquisition and date of the Gazette. As the BP approval was still valid, I find that the DO approval likewise was still valid. There cannot be any approval of a BP if the DO (which is the basis for any BP to be approved) had lapsed.

CONCLUSION

[94] For the reasons above, I determine that the total amount of compensation payable to the applicant in this land reference is RM1,326,113. Consisting of: (a) RM655,545 in respect of the market value of the acquired land; and (b) RM670,568 in respect of injurious affection.

[95] Consequently, the total amount of additional compensation now payable to the applicant in this land reference is RM241,111. Consisting of an additional compensation of: (a) RM119,190 in respect of the market value of the acquired land; and (b) RM121,921 in respect of injurious affection.

[96] A summary of my decision is as follows:

Item	Award by Land Administrator	Valuation of Government Valuer	Valuation of Private Valuer	Award in this land reference	Additional Compensation
Land Value *(acquired land area 59.595 sq m)*	RM536,355 *(@ **RM9,000** per sq m)*	RM387,367 *(@ **RM6,500** per sq m)*	RM833,300 *(@ **RM13,993** per sq m)*	**RM655,545** *(@ **RM11,000** per sq m)*	**RM119,190**
Injurious Affection *(remainder land area 406.405 sq m)*	RM548,647 *(**15% of** RM9,000 per sq m on 406.405 sq m)*	Nil	RM44,341,700 *(**100% of** land area of 3,168.83 sq m @ RM13,993 per sq m*	**RM670,568** *(15% of RM11,000 per sq m on 406.405 sq m)*	**RM121,921**
Total	RM1,085,002	RM393,367	RM45,175,000	**RM1,326,113**	**RM241,111**

[97] I made the following orders:

(a) the land administrator shall pay interest at the rate of 5%pa on the additional compensation sum of RM241,111 from 24 February 2020 (being the date on which the land administrator took possession of the acquired land) to the date of payment;

(b) the applicant shall pay fees of RM1,000 to each assessor;

(c) there shall be no order as to costs; and

(d) the deposit of RM3,000 paid by the applicant to the respondent shall be refunded forthwith.

Order accordingly.

Reported by Dzulqarnain Ab Fatar